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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL AARON RICKS,

Defendant and Appellant.

F076893

(Super. Ct. No. F16904900)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge. (Retired Judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Smith, J. and DeSantos, J.

Appellant Michael Aaron Ricks pled no contest to second degree robbery (Pen. Code, § 211)¹ and admitted a serious felony enhancement (§ 667, subd. (a)) and allegations that he had a prior conviction within the meaning of the “Three Strikes” law (§ 667, subds. (b)-(i)). On appeal, Ricks contends: (1) the court abused its discretion and violated his right to due process when it denied his *Romero*² motion; and (2) the matter should be remanded to the trial court for it to exercise its discretion whether to impose or strike his serious felony enhancement.³ We find merit to this last contention and remand the matter for the trial court to exercise its discretion. In all other respects, we affirm.

FACTS

The Underlying Offense

On July 24, 2016, at approximately 7:00 a.m., Ricks, a second male, and a female were standing by the entrance door to T. Singh’s minimart in Fresno when Singh unlocked the door. As Singh began walking towards the back of the store, Ricks

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

³ On September 30, 2018, the Governor signed Senate Bill No. 1393 (S.B. 1393), which amends sections 667, subdivision (a) and 1385, subdivision (b), effective January 1, 2019, to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the current versions of these statutes, the court is required to impose a five-year consecutive term for “any person convicted of a serious felony who previously has been convicted of a serious felony” (§ 667, subd. (a)), and the court has no discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (§ 1385, subd. (b).) However, under the amended version of these statutes, the trial court will have discretion to strike serious felony enhancements.

On November 21, 2018, this court sent a letter to the parties informing them that they could file a brief addressing whether these amendments to sections 1385 and 667 apply retroactively to Ricks and, if so, whether the matter should be remanded to the trial court so it can exercise its discretion to reimpose or strike the five-year consecutive term the court imposed on his robbery conviction.

approached him from behind, put an object to his back, and told him to get on the ground. Ricks and the other male then took \$370 from the cash register, a safe, and several packs and packages of cigarettes valued at \$504 and left the store. After reviewing surveillance video, Fresno police officers identified Ricks as one of the robbers.

On July 27, 2016, during an interview with a police detective, Ricks denied he was the person in a photograph that was made from a frame from the surveillance video. However, when the detective asked Ricks if being in the store had anything to do with Ricks's cocaine problem, Ricks stated that it did and he admitted being the person in the photograph. Ricks, however, claimed he did not know the two other subjects who participated in the robbery and that he had just met them that morning. He further stated he was high on cocaine and not in his right mind during the robbery. After the robbery, the trio went to an abandoned house down the street, split the money and cigarettes, and Ricks received a little over \$100. Ricks then went to church and began to feel guilty. Ricks also told the detective he wanted to apologize to the victim.

On August 4, 2016, the Fresno County District Attorney filed a complaint charging Ricks with robbery, a serious felony enhancement, and with having a prior conviction within the meaning of the Three Strikes law. The enhancement and Three Strikes allegation were based on Ricks's 1996 conviction for robbery.

On April 28, 2017, Ricks entered his plea, as noted above, in exchange for a nine-year lid.

Ricks's Probation Report

Ricks's probation report, in pertinent part, indicated that Ricks was a member of the Crips street gang for 19 years and that his risk assessment score was "High Violent." Additionally, Ricks reported that he began using cocaine in the 1980's and that he used it once a week by smoking or snorting it. However, he had never participated in a treatment program.

In August 1977, when he was 16, Ricks was adjudicated on four counts of robbery, three with the use of a weapon, and committed to the California Youth Authority (CYA). Ricks violated his parole twice before being discharged from parole in June 1982.

As an adult, Ricks was convicted of seven felonies: possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) in 1986; two counts of transportation or sale of a controlled substance (Health & Saf. Code, 11352, subd. (a)) in 1986, one in 1990 and one in 1997; robbery (§ 211) in 1996; and possession for sale of a controlled substance (Health & Saf. Code, § 11351.5) in 2004. He was also convicted of the following misdemeanors: providing false information to a police officer (§ 148.9) in 1985; being under the influence of a controlled substance (Health & Saf. Code § 11550) in 1995; domestic violence (§ 273.5, subd. (a)) in 2009; battery (§ 242) in 2011; and possession of a firearm by a felon (§ 30305, subd. (a)(1)) in 2015. Ricks served five prison terms and several terms in local custody and he violated his probation or parole five times. Excluding concurrent terms, from 1986 through 2004, Ricks was sentenced to serve a total of 23 years 8 months in prison.

Ricks's Romero Motion and Sentencing

On June 22, 2017, defense counsel filed a *Romero* motion asking the court to strike Ricks's prior strike conviction, arguing that doing so was warranted because Ricks's prior strike conviction occurred more than 20 years earlier, Ricks did not have an "adult history of violence," and that he had been clean and sober and had no felony convictions since 2003. With respect to his current robbery offense, defense counsel noted that Ricks complied with law enforcement, voluntarily submitted to questioning, and he admitted his involvement in the robbery because of his feelings of guilt and remorse. The moving papers also noted that Ricks would suffer the consequences of his strike conviction even if the court struck that conviction for purposes of the Three Strike

law because he would still receive a five-year enhancement based on the underlying robbery conviction.

On January 12, 2018, at Ricks's sentencing hearing defense counsel repeated most of the arguments he made in the *Romero* motion.

When the court asked the prosecutor if there was any reason to believe Ricks's statement that he used a "toy gun" was not true, he stated there was not. The prosecutor then argued that striking the prior conviction would not be appropriate because Ricks's criminal history dated back to the mid-1970's.

In denying the *Romero* motion, the court noted that Ricks had been to prison several times since his juvenile robbery adjudications, that he had a lengthy criminal record, and that his instant offense was another robbery. In accord with his plea agreement, the court then sentenced Ricks to an aggregate nine-year term, a doubled mitigated term of four years and a five-year serious felony enhancement.

DISCUSSION

Standard of Review and Applicable Law

In *Romero*, the Supreme Court held that trial courts have discretion to dismiss or strike allegations of prior felony convictions. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385[, subdivision](a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The analysis whether an offender may be deemed outside the spirit of the law is a stringent one. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) And there is a strong presumption that any sentence that conforms to the Three Strikes law's sentencing scheme is rational and proper. (*Id.* at p. 378.) "Because the circumstances must be 'extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid.*)

We review the trial court's decision for an abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 375.) An abuse of discretion is not shown merely because reasonable people might disagree about whether to strike a prior conviction. Where the record is silent, or where it " 'demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Id.* at p. 378.)

Analysis

Ricks was a gang member for 19 years and he had a lengthy criminal record that dated back to 1977 when, as a juvenile, he was adjudicated on four counts of robbery, three while armed with a weapon. From 1985 through 2015 he had 12 convictions including the 1996 robbery conviction underlying the Three Strikes and serious felony allegations, and six other felony convictions involving the possession, transportation or sale of drugs. Ricks also served a lengthy CYA commitment, five prison terms, and numerous local incarcerations, and he violated his probation or parole five times. In the instant case, Ricks committed another robbery offense and even though he may have used

a toy gun to commit this offense, by acting in concert with two others, he greatly increased the potential for violence. Thus, the record supports the court's implicit determination that Ricks did not fall outside the spirit of the Three Strikes law.

Ricks contends his strike conviction was remote because it occurred over 20 years ago, his criminal history, although extensive, was not violent, and his current robbery offense was mitigated because it involved the use of a toy gun, did not involve any violence against Singh, and was "drug related." He also cites *People v. Garcia* (1992) 20 Cal.4th 490 (*Garcia*) to contend that he would have received sufficient punishment if the strike had been stricken because he would still have received a seven-year term. Thus, according to Ricks, the court abused its discretion and denied him his right to due process when it denied his *Romero* motion. We disagree.

The court reasonably found that Ricks's 1996 robbery conviction was not remote because he had not lived a blameless life since committing that offense. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) Further, "the Three Strikes law does not require *multiple* violent felony offenses to come within the statutory scheme." (*People v. Strong* (2001) 87 Cal.App.4th 328, 340.) Nevertheless, we note that in addition to his robbery offenses, Ricks also had misdemeanor convictions for domestic violence, battery, and possession of a firearm by a felon and that these offenses, by their nature, involved violence or the potential for violence. Additionally, although Ricks claimed drugs were a motivating factor in his commission of the instant robbery offense, he had never participated in a drug treatment program even though his numerous drug convictions indicate his drug problem was of long-standing origin. (Cf. *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 ["drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment"].) Further, the court could reasonably find that from 1985 through 2009, Ricks did not commit more offenses, including ones involving violence, because he was

incarcerated during most of that period of time. And although in *Garcia* the Supreme Court held that “a defendant’s sentence is ... a relevant consideration when deciding whether to strike a prior conviction allegation[,]” it did not hold that the court must strike the allegation if doing so will result in the defendant, nevertheless, serving a substantial sentence. (*Garcia, supra*, 20 Cal.4th at p. 500.) Thus, we conclude that the court did not abuse its discretion or violate Ricks’s constitutional right to due process when it denied his *Romero* motion.⁴

The Serious Felony Enhancement

S.B. 1393, which becomes effective January 1, 2019, gives “courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 965.) The parties agree this matter should be remanded for resentencing under this new law. “Because it is highly unlikely that defendant’s judgment will ... be final by January 1, 2019, we remand the matter to the trial court for resentencing.” (*Id.* a p. 973, fn. omitted.)

DISPOSITION

The matter is remanded to the trial court with directions to resentence Ricks after January 1, 2019, pursuant to Penal Code sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393 (2017-2018 Reg. Sess.). (Stats. 2018, ch. 1013, §§ 1-2.) In all other respects, the judgment is affirmed.

⁴ Ricks contends the court did not consider certain circumstances or give them sufficient weight, e.g., the alleged nonviolent nature of his criminal history, his expression of remorse, and his early admission of guilt. The court considered the circumstances because they were included in the probation report which the court read. In any case, defense counsel did not object to the court’s ruling on Ricks’s *Romero* motion and the failure to do so forfeited Ricks’s claim that the court did not consider certain circumstances or properly weigh others. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)